86-448

No.

In The

Supreme Court Of The United States

SEP 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

CHARLES M. GRAY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTION PRESENTED

WHETHER THE FACT THAT A SUSPECT SIGNS A FORM WAIVING HIS RIGHTS UNDER *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966), DURING THE MIDDLE OF HIS CONFESSION RATHER THAN AT THE BEGINNING CAN NEGATE AN OTHERWISE VALID *MIRANDA* WAIVER?

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OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at 200 Conn. 523, _____ A.2d _____ (1986), and appears in the petitioner's appendix. The ruling of the state trial judge denying the respondent's motion to suppress his confession is unreported but also appears in the petitioner's appendix.

JURISDICTION

The Connecticut Supreme Court rendered its decision on July 15, 1986. The petitioner did not seek reargument in the Connecticut Supreme Court and did not request an extension of time within which to file a petition for certiorari. This Court has jurisdiction to review by writ of certiorari the judgment of the Connecticut Supreme Court pursuant to 28 U.S.C. § 1257(3) (1982).

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

In a 4-1 decision, the Connecticut Supreme Court held on federal constitutional grounds that the fact that a suspect signs a form waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), during the middle of his confession rather than at the beginning compels a finding that the suspect did not voluntarily waive his rights, notwithstanding the fact that the suspect had received notice of his rights three times within the previous twenty-four hours, twice stated that he was familiar with his rights because he had been arrested before, twice expressly informed the police that he would like to talk to them, and once, just prior to providing a detailed, sworn confession, indicated orally that he would waive his rights. This decision is so contrary to this Court's decision in *North Carolina v. Butler*, 441 U.S. 369 (1979), that this Court should grant the state's petition for a writ of certiorari and summarily reverse.

The respondent was convicted on six counts of a seventeen count information arising out of a robbery and kidnapping of three victims in an East Windsor, Connecticut motel room on January 29, 1977. Petitioner's Appendix (Pet. App.) at 2A-3A.[1] The trial court allowed into evidence the respondent's three page, detailed confession in which the respondent admitted that prior to the crime he and two other companions had "talked about taking [a] bookie off," that while the two others went into the motel room the respondent "stayed in the car to be a look out," and that after the robbery he had received $11.00 and, indirectly, gasoline for his car charged on one of the victim's credit cards. *Id.* at 7A, 14A-15A. On appeal a majority of the Connecticut Supreme Court found error in the trial court's ruling and ordered a new trial without the confession on the four counts to which the confession related. *Id.* at 13A-19A. The court also found insufficient

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[1] Unless otherwise indicated, the statement of the case derives entirely from the Connecticut Supreme Court's opinion, which the petitioner's appendix reproduces in full.

evidence of guilt on the two remaining counts and ordered a judgment of acquittal as to them. *Id.* at 13A, 16A, 19A.[2]

The majority and dissenting opinions relied on the following facts adduced at a mid-trial suppression hearing concerning the respondent's confession. *Id.* at 4A–12A, 20A–21A. The respondent first received his *Miranda* warnings when Connecticut and Massachusetts police officers came to his apartment during the early evening hours of April 2, 1977 in order to execute search and arrest warrants. *Id.* at 3A–4A 8A, 10A. The respondent told the police that he had been arrested before and that he knew and understood his rights. *Id.* at 8A, 10A.

The respondent spent the night in jail and at 7:30 a.m. the next morning he met with Officer Paula Higgins of the Springfield, Massachusetts police department. *Id.* at 4A–5A. Higgins again advised the respondent of his constitutional rights. *Id.* at 5A, 9A. The respondent reiterated that he was "familiar with his rights" because he had been arrested before but that he "wanted to talk, anyway." *Id.* at 5A. The respondent then gave an incriminating oral statement similar in content to the later statement in issue here. *Id.* at 5A, 7A. The police reduced this first statement to typewritten form, but the defendant refused to sign it and apparently would only initial a correction. *Id.* at 5A. One of the police officers nonetheless signed the respondent's name to a carbon copy of the statement in order, in his words, to "use a little subterfuge against a codefendant, that's all." *Id.* at 6A. The trial judge suppressed the statement on the ground of insufficient waiver. *Id.* The state has not challenged that ruling.

Approximately eleven hours later, the respondent, still at the Springfield police department jail, met with Lieutenant Thomas J. Laufer, Sr., of the East Windsor police department. *Id.* at 3A, 6A. Lieutenant Laufer first advised the respondent of his *Miranda* rights. *Id.* at 6A, 7A, 8A. When Laufer asked

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[2] The state does not contest the disposition of these two counts.

respondent whether he would talk about credit cards, the respondent replied that he "didn't mind talking about any credit cards" and expressly agreed to give a statement and waive his rights. *Id.* at 21A. The respondent commenced giving his confession at approximately 6:30 p.m. *Id.* at 7A. At approximately 6:42 p.m. the respondent signed a waiver of rights form. *Id.* at.[3] Lieutenant Laufer did not attempt to have the respondent sign the waiver earlier because Officer Higgins, who had been in the room, had temporarily left and Laufer wanted to have the respondent sign "in front of somebody else." *Id.* at 6A, 7A, 12A, 21A. Officer Higgins did make it back to witness the respondent sign the form. *Id.* at 6A, 12A.

The respondent completed his confession at 6:50 p.m. *Id.* at 7A. Laufer had recorded the confession on a form separate from the waiver of rights form. *Id.* at 9A, 11A. The respondent refused to sign this separate form and did not initial an advisement of rights section on that same form. *Id.* at 7A, 11A. The respondent, did, however, raise his right hand, take an oath, and swear to the truth of the matters contained in the written statement. *Id.* at 7A–8A. Laufer signed his name under the phrase "Subscribed and sworn to before me" on each page and also signed in a space labeled "Witnessed." *Id.* at 7A, 11A.[4]

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[3] When the trial prosecutor asked Laufer for the time when the respondent signed the waiver form, Laufer clarified: "6:42, but he had been given his rights, and acknowledged his rights and waivers prior to the signature." Trial Transcript (July 7, 1982) at page 178.

The waiver of rights form was dated April 2, 1977 instead of April 3, 1977. The trial judge found this discrepancy to be a "clerical error." Pet. App. at 6A, 12A.

[4] The respondent testified at the suppression hearing that the police ignored his request for an attorney and that the police had threatened, abused, and beaten him. Transcript of Proceedings on July 7, 1982, at pages 13, 17–18, 20–21. The trial judge, however, rejected "as not credible the testimony of Mr. Gray concerning his treatment which he received at the hands of the police on the night of April 2nd and the morning of April 3d." Pet. App. at 25A. The Connecticut Supreme Court appropriately

(continued)

On the basis of these facts a majority of the Connecticut Supreme Court held on federal constitutional grounds that it did not "find 'affirmative conduct [by the defendant] indicative of a knowingly and intelligently made decision not to remain silent' . . . under all the circumstances of this case." *Id.* at 12A. (quoting *State v. Harris*, 188 Conn. 574, 581, 452 A.2d 634 (1982), *cert. denied*, 460 U.S. 1089 (1983).[5] The court observed that "[t]he totality of the circumstances demonstrates that the defendant's statement was given at least in part before he waived his rights or signed the waiver form," *id.*, and that "[t]he circumstances demonstrate less than tolerable treatment of constitutional safeguards, thereby compelling a finding of error on the trial court's admission into evidence of the statement given to Laufer by the defendant on April 3, 1977." *Id.* at 12A–13A. Dissenting Justice Santaniello wrote that "[r]egardless of the validity of the written waiver, the record reveals that the defendant implicitly waived his right to remain silent by his expressed willingness to speak." *Id.* at 21A.

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[4] continued
did not rely on this aspect of the respondent's testimony in finding the respondent's confession inadmissible and thus this Court need not consider this testimony further.

[5] The majority did not mention the state constitution, much less provide a "plain statement in its judgment or opinion" of any independent, adequate state law ground. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Thus no jurisdictional question exists in this case. *Id.* at 1037–44.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN DIRECT CONFLICT WITH *NORTH CAROLINA V. BUTLER*

In *North Carolina v. Butler*, 441 U.S. 369 (1979)., this Court held that "[a]n express waiver or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." Contrary to the letter and spirit of *Butler*, the decision below invalidates an otherwise valid *Miranda* waiver primarily because the respondent did not sign a rights waiver form at the beginning of his confession.

Little dispute can exist that, absent the late signing of the rights waiver form in this case, the respondent's waiver would have clearly satisfied the *Miranda* rule. The respondent received notice of his rights three times within the twenty-four hours prior to his confession, he stated twice that he was familiar with his rights because he had been arrested before, he twice expressly informed the police that he would like to talk to them, and he orally waived his *Miranda* rights just prior to providing a sworn, detailed confession. It simply defies reality to conclude that a suspect with such an informed understanding of the interrogation process who so clearly expresses a desire to speak to the police did not intend to give up his right to remain silent. *Compare Tague v. Louisiana*, 444 US. 469 (1980) (waiver invlaid because no evidence introduced that suspect understood or waived his rights) *with United States v. Zamarippa*, 544 F.2d 978, 908-81 (8th Cir. 1976) (waiver valid because suspect received and understood his rights and agreed to speak with police, even though refusing to sign waiver form).

The question thus becomes whether the late signing of a waiver form can destroy an otherwise valid waiver. As this Court noted in *Butler*, the federal Courts of Appeals have

unanimously rejected the argument that the complete refusal to sign a written waiver form precludes a finding of waiver. 441 U.S. at 378 n.5. It follows logically that a temporary delay in the signing of such form cannot have greater effect. This conclusion becomes even more compelling when, as here, the delay in signing the waiver form occurs as a result of a valid police concern for the presence of an additional witness to the signature. Certainly a late signing of a waiver form, while not dispositive of whether an earlier waiver took place, must add to rather than subtract from the evidence of waiver. *See Hyde v. Massey,* 592 F.2d 249, 250 (5th Cir. 1979) (signing of waiver form at end of confession contributes to finding of waiver); *United States v. Montos,* 421 F.2d 215, 224 (5th Cir. 1970) (signing of waiver form forty minutes after statement contributes to finding of waiver).

The only other arguably distinct factor that the Connecticut Supreme Court relied upon was what it termed the "less than tolerable treatment of constitutional safeguards." Although the police engaged in what they themselves labeled "subterfuge" in signing the respondent's first confession, the trial judge suppressed this confession on the ground of involuntary waiver. In light of this Court's decision in *Oregon v. Elstad,* 105 S.Ct. 1285 (1985), such a finding of involuntary *Miranda* waiver, as opposed to a finding of an involuntary or coerced confession, does not in any way impair the admissibility of the respondent's second confession. And the fact that Lieutenant Laufer purported to witness the respondent's signature to the second confession when the respondent had not in fact signed also has no bearing on the validity of the second confession. The respondent, as argued, had already waived his rights well prior to and obviously without any knowledge of Laufer's subsequent misconduct. As this Court recently stated in *Moran v. Burbine,* 106 S.Ct. 1135 (1986):

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and

> knowingly relinquish a constitutional right . . . . [W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence of [the suspect's] election to abandon his rights.

Id. at 1141–42. *See also Oregon v. Mathiason,* 429 U.S. 492, 495–96 (1977) (police subterfuge in prompting suspect to talk is irrelevant to question of whether custody exists). Thus what the Connecticut Supreme Court described as "less than tolerable treatment of constitutional safeguards" should not, in this case, have resulted in the exclusion of a voluntary confession elicited in conformance with *Miranda* and *Butler.*[6]

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[6] This court recently granted certiorari in *Connecticut v. Barrett,* 197 Conn. 50, 495 A.2d 1044 (1985), *cert. granted,* 106 S.Ct. 1967 (1986), a case in which the Connecticut Supreme Court held that when a suspect refuses to give a written statement without his attorney being present he has sufficiently invoked his Miranda rights, even if he remains willing to answer questions orally. While this Court may wish to postpone resolution of the petition at bar until it decides *Barrett,* it would also appear that this Court can resolve the petition at bar without the aid of a decision in *Barrett,* since the case at bar does not involve any form of a refusal to provide a statement.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Connecticut Supreme Court and summarily reverse its judgment.

Respectfully submitted.

THE STATE OF CONNECTICUT

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APPENDIX

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RULING OF THE STATE TRIAL COURT CONCERNING THE RESPONDENT'S CONFESSION 23A

OPINION OF THE CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT *v.* CHARLES M. GRAY (11796)

HEALEY, DANNEHY, SANTANIELLO, CALLAHAN and SHAUGHNESSY, Js.

Convicted of one count of the crime of conspiracy to commit robbery in the first degree, two counts of the crime of being an accessory to robbery in the first degree, two counts of the crime of being an accessory to kidnapping in the second degree and one count of the crime of being an accessory to burglary in the second degree, the defendant appealed to this court challenging the trial court's denial of a motion he had made to suppress a confession he had given to a police officer shortly after his arrest. *Held* that, although there was sufficient evidence before the trial court to sustain its conclusion that, prior to giving the challenged statement, the defendant had been advised of and understood his constitutional rights, that court erred in admitting the statement, the evidence not being sufficient to establish that the defendant had validly, knowingly and intelligently waived those rights; accordingly, the matter was remanded for further proceedings except with respect to one count of being an accessory to robbery in the first degree and one count of being an accessory to kidnapping in the second degree, on which a judgment of acquittal was directed, the state having conceded that, even if the confession had been properly admitted, there was insufficient evidence to support a conviction thereon.

(One justice dissenting in part)

Whether acquittal or new trial should be ordered where reversal of conviction is predicated on erroneous receipt of evidence, discussed.

Argued February 5—decision released July 15, 1986

Substitute information charging the defendant with three counts of robbery in the first degree, three counts of being an accessory to robbery in the first degree, three counts of kidnapping in the second degree, three counts of being an accessory to kidnapping in the second degree, and one count each of conspiracy to commit robbery in the first degree, burglary in the

second degree, being an accessory to burglary in the second degree, assault in the second degree and being an accessory to assault in the second degree, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *O'Donnell, J.;* judgment of guilty of two counts of being an accessory to robbery in the first degree, two counts of being an accessory to kidnapping in the second degree, conspiracy to commit robbery in the first degree and being an accessory to burglary in the second degree, from which the defendant appealed to this court. *Error; further proceedings.*

Joseph G. Bruckmann, assistant public defender, with whom, on the brief, was *Joette Katz,* public defender, for the appellant (defendant).

Mark D. Arons, special assistant state's attorney, with whom were *Carl Schuman,* assistant state's attorney, and, on the brief, *John M. Bailey,* state's attorney, and *Herbert Appleton,* assistant state's attorney, for the appellee (state).

ARTHUR H. HEALEY, J. The principal issue on this appeal is whether the trial court erred in denying the defendant's motion to suppress a confession made to a police officer after his arrest. The defendant was charged in a seventeen count substitute information arising out of a robbery in a motel room in East Windsor on January 29, 1977. After a trial to the court, *O'Donnell, J.,* the defendant was convicted of one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (4), two counts of being an accessory to robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (4) and 53a-8, two counts of being an accessory to kidnapping in the second degree in violation of General Statutes §§ 53a-94a and 53a-8, and one

count of being an accessory to burglary in the second degree in violation of General Statutes §§ 53a-102 (a) and 53a-8. The defendant received an effective sentence of not less than six nor more than twelve years. He appeals from the judgment of conviction.

The evidence adduced before the court necessary to our disposition of the principal issue was as follows: After meeting at a restaurant in East Windsor on the evening of January 28, 1977, Dorothy Mercer, Roger E. Williams, Kenneth Moule, Leonard Bancroft and Brad Baker went to the Ramada Inn in East Windsor in the early morning hours of January 29, 1977. Bancroft remained in the car in the parking lot in the back of the inn. Mercer and Williams were in a room at the motel when two black males followed Baker as he entered the room. The two males bound the three victims with tape, put a pillowcase over Williams' head, and hit Mercer on the head with a blunt object. Bancroft subsequently arrived at the room and helped the victims remove the tape. Personal property of the victims was taken by the two males including credit cards, cash, a jacket, and keys. At no time was the defendant ever identified as a participant in the incident in the motel room by the victims or anyone else.

Lieutenant Thomas J. Laufer, Sr., of the East Windsor police department investigated the Ramada Inn robbery. Laufer testified that a credit card slip, identified by Williams as being an imprint of one of his cards taken during the robbery, was obtained by the police from a gas station in Springfield, Massachusetts.

During the early evening hours of April 2, 1977, warrants were issued and executed in Massachusetts to arrest the defendant and to search his apartment and car in Springfield. Laufer accompanied Springfield police officers to the defendant's apartment. The defendant was arrested and taken into custody when

he arrived at his home at approximately 7:15 p.m. and was subsequently taken to the Springfield police station where he was charged with possession of a stolen credit card. At the police station, the defendant allegedly made inculpatory statements to Springfield police officers and to Laufer.

The defendant moved before trial to suppress any statements allegedly made by him which the state intended to use at trial. The motion, which also requested a preliminary hearing on the issue, was denied and the court stated that it would be addressed at trial. During the course of the trial, the state attempted to introduce as a full exhibit a statement allegedly made by the defendant to officer Paula Higgins of the Springfield police department. The trial court granted the defendant's motion to suppress the Higgins statement, exhibit L, because the state had failed to prove that the defendant had "voluntarily and knowingly waived his rights" prior to the taking of the statement. The defendant also moved to suppress a statement, exhibit P, that he had allegedly later made to Laufer at the Springfield police station. The motion was denied and an exception was taken. The circumstances surrounding the making of the statements must be examined in order to address the defendant's claim of error.

The defendant testified for the limited purpose of the issue of the admissibility of his alleged statements to Higgins and Laufer. He testified that two Springfield police officers, Detective Breer and Lieutenant Robert Seymour, took him from his holding cell to a "small room" upstairs and interrogated him about the stolen credit card and, after receiving no incriminating response, returned him to his cell.

On April 3, 1977, at approximately 7:30 a.m., Higgins interrogated the defendant at the crime prevention

bureau at the Springfield police department. Several police officers were present at various times during the taking of the statement, including Seymour, Breer and officer Kelly. Laufer was not present at this time. Higgins testified that the defendant had no difficulty talking to her and was not nervous, upset or threatened. She advised the defendant of his rights, including his right to consult an attorney before questioning began. She testified that he told her that he was "familiar with his rights" because he had been arrested before but that he "wanted to talk, anyway." The oral statement that he allegedly gave to Higgins was reduced to writing and later typed. The defendant refused to sign it although he allegedly initialed a correction that had been made on it.[1] The interrogation of the defendant lasted approximately forty-five minutes.

[1] Exhibit L contained an unsigned advisement of rights and the purported confession of the defendant given to officer Paula Higgins. Exhibit L contained the following statement:

"About two months ago on a weekend, on a Friday, I left the Y at about 8:00 after playing basketball. I got me a sandwich at the Pizza King and met Charlie Cotton and Egghead. I have know Cotton about a year and he lives on Lincoln St. I met Egghead last summer and he lives on Atwood Place. Egghead is a brown skinned dude, about 22, about 6'2" tall, about 175 pounds. He has a medium afro & a mustache.

"We rode around in my Cougar, Cotton, Egghead and I, and we were talking. Eggie said he knew this bookie that was going to be paying this guy off. He said he was sure that my share would be at least $500 just for driving him. He said to get on 91 and head towards Hartford. It was about a twenty minute drive and Eggie showed me where to pull off and I parked straight ahead after I drove to the right of the gas station. Eggie was like hipping Cotton to it. He'd say when we come up on the guy we're going to do it then because we know he's got the money on him. They both told me to stay right here. Cotton had a brown face mask and Eggie had a small silver gun, like a .22. They told me to make sure I don't let the police come up on them. They said to flash my lights twice if the man came. I saw them take a right around the front of the Ramada Inn and they came back about 45 minutes later with a brown paper bag. Egg got in the back seat with the bag and Cotton got in the front. On the way back they said they didn't get the big package. I went to Gus Jones' and played the pinball machine. Cotton slid over and drove my car and Egg got out of the back to the front.

Higgins and Seymour testified that Seymour signed the defendant's name to a carbon copy of the statement given to Higgins and that Seymour and Breer signed as "witnesses." Seymour explained that he signed the defendant's name to the purported confession in order to "use a little subterfuge against a codefendant, that's all."[2] The statement taken by Higgins was ruled inadmissible and it was suppressed by the trial court on the basis of insufficient waiver.

The defendant, who had been in custody almost twenty-four hours, was then interrogated by Laufer at the Springfield police department on April 3, 1977, at approximately 6:30 p.m. Laufer had already been told by Higgins that day that a statement had been taken from the defendant and that the substance of the statement concerned the crimes that he was investigating. Laufer testified that he advised the defendant "of his *Miranda* warning" in a waiver that he filled out. He and Higgins witnessed the defendant sign the waiver form. The date on the form was "4/2/77," but, nevertheless, Laufer testified that it was signed on April 3, 1977, just before he took the defendant's statement. The trial court, during a colloquy on the admissibility of the waiver form, stated that the discrepancy in the dates as disclosed on the form and as testified to by Laufer was only a "clerical error" and admitted the waiver form as a full exhibit. Although the form

They said they were going to see their people and then they would be right back. It was Egg that said this. They took off and when they returned they gave me $11 and said that was my share. Egg had brought the medium size brown shopping bag with him that night.

"A couple of days after, Cotton was driving my car. [/s/] C.G.

"I let Cotton use my car the next day while I was at the Y and when he came back he had put gas in it."

[2] We note that the trial court commented: "The Court cannot condone the conduct of the Springfield Police in the subterfuge practiced upon this or any other accused person, and the Court cannot help but look with a jaundiced eye upon the testimony that it was hearing here in the court as to other matters."

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on which the defendant's statement is written and Laufer's testimony indicate that the interrogation began at 6:30 p.m. and ended at 6:50 p.m., the waiver form was not signed until 6:42 p.m. Laufer explained that the defendant had been given "his rights" at 6:20 p.m. and that interrogation began at 6:30 p.m., but that neither the witness nor the defendant signed the form until 6:42 p.m. because "[t]he officer that was nearby had left." The defendant testified that the only person who advised him of his rights was Laufer. Laufer concluded the statement at 6:50 p.m., eight minutes after the defendant signed the waiver form, but the defendant refused to sign the statement.[3] Laufer testified that

[3] The three page statement of the defendant taken by Lieutenant Laufer, exhibit P, was as follows:

"This statement is given to Lieutenant Laufer of the East Windsor Police Department without any threats or promises being made to me. On or about the 29th of Jan. 1977, I think on a Friday night, I drove down to East Windsor, Conn. in my car, a 1974 Mercury hardtop green with Mass. registration P45-905. In the car with me was a Mike Crumps (or something like that) and a man called Egghead. I think Egghead lives at Edward Place in Springfield, Mass., he is about 6'2", 21 yrs., med. brown skin. Mike Crumps lives somewhere off of Bay St., 6'2 - 190 lbs light brown skin, his bottom lip looks bigger than the top. We drove to the Ramada Inn off of RT 91, parked the car on the side. Mike and Egghead went in to the inn to take a bookie off. This was around the time the number 666 came out. Egghead had a full face suede mask, same one that came out of my house on 4-2-77 at 9 Halsey St. Mike had a gun, I think a .22 cal., handle was brownish marble looking, the rest was silver. We talked about taking the bookie off the afternoon of 1-29-77 or thereabouts. When they went in the building at Ramada on or about Jan. 29, 1977, I stayed in the car to be a look out. I waited about 40 mins. they came back with a bag. Egghead said we didn't get a chance to get all the money, someone was in the room with him. When they came out of the Inn, Egghead pushed his hat back, part of a snorkle jacket and he had the mask on top of his head and took it off, Crump had a bag. I am not sure what was in it. They gave me $11.00 of what they got. We left and came back to Springfield, Mass. Crump sold some credit cards to Charles Cotton. One of the cards Crump sold to Cotten, Cotten had used to put gas in my car a couple of days after the Ramada Inn Robbery, this would have been some time around Jan. 31, 1977 at a BP gas station on St. James Ave. Springfield. This was a credit card in the name of Roger Williams.

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the defendant raised his right hand, took an oath, and swore to the truth of the matters contained in the statement. On each page of the statement, including the first page on which he wrote the phrase himself, Laufer himself signed his name to the phrase "Subscribed and sworn to before me . . ." despite the fact that the defendant had not signed it.

The defendant's principal issue on appeal is whether the trial court erred in denying the defendant's motion to suppress his statement to Laufer. The defendant claims that the state failed to prove by a fair preponderance of the evidence that the defendant was informed of, or understood, his right to have an attorney present during questioning. He claims that the state failed to meet its burden of establishing that he knowingly, intelligently and voluntarily waived his fifth amendment privilege against self-incrimination, as required by *Miranda* v. *Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

We first address the issue of whether the defendant was properly informed of the constitutional rights as enunciated in *Miranda* v. *Arizona*, supra. There was some testimony at trial that Seymour and Laufer advised the defendant of his "rights" at his apartment on April 2, 1977, and that the defendant informed Higgins that he had been arrested before and that he knew and understood his rights. Laufer testified that he had given the defendant all his rights before any interrogation began, although the defendant did not

"The above statement is true & correct. I understand that the given a false statement to a police officer in order to mislead him in his investigation a crime & I could be arrested for same. I have read this statement & will appear in court as a witness if called.

" 'Note' Suspect would not sign statement, he did swear under oath to this officer that it was true.

"Subscribed and sworn to before me at Springfield, Mass. this 3 day of April 1977.

"/s/LT Laufer"

sign the waiver form until twelve minutes into the twenty-minute interrogation. Laufer did not have the defendant sign the waiver portion of the form on which he recorded the statement but rather used a separate form dated a day earlier than when the statement was given. There was some testimony from Higgins as to the specific advisements she had given the defendant. She testified that she told the defendant that he "didn't have to talk to [her] or any other police officer, and that if he did, anything that he said can and would be used against him. . . . [He] had the right to consult with an attorney before questioning. . . . [If] he wanted, he could stop talking at any time, and he could consult an attorney. . . . [If] he didn't have the money for an attorney, the Court would appoint one." The defendant claims that Higgins' recitation of rights did not include the "significant and separate right to have an attorney present during interrogation." See *Miranda* v. *Arizona*, supra, 471.

While we recognize that "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures"; *California* v. *Prysock*, 453 U.S. 355, 359, 101 S. Ct. 2806, 69 L. Ed. 2d 696 (1981); warnings which are a "fully effective equivalent" must be given to a defendant. *Miranda* v. *Arizona*, supra, 476. The evidence presented that indicated that warnings were given to the defendant at or around the time of his arrest never explicitly enunciated the rights allegedly given. The state, which bears the burden of proof in these matters, sufficiently demonstrated that the warnings given by Higgins, although she did not testify that she advised the defendant of his right to have an attorney present *during* questioning, and the waiver form, signed by the defendant and introduced into evidence by the state, were adequate and sufficient warnings. The defendant's claim that the *Miranda* warnings were insufficient because of Higgins' failure to inform him

of the right to have an attorney present during interrogation does not have merit under the circumstances of this case. The waiver form signed by the defendant and from which Laufer read the defendant his rights contained the explicit statement that the defendant had a right to have an attorney with him during questioning. In addition, the defendant testified that he was advised of his rights by Laufer, and Higgins testified that the defendant was aware of his rights when Seymour first read them to him prior to the time that he was taken into custody.

On the basis of the record before us, especially the testimony of the defendant that Laufer advised him of his rights, we conclude that there was sufficient evidence before the trial court to sustain its conclusion that the defendant was advised of and understood his constitutional rights.

Our next inquiry must focus on whether the defendant voluntarily, intelligently and knowingly waived his constitutional rights before making the statement to Laufer. In making this determination, "our usual deference to the finding of the trial court on questions of this nature is qualified by the necessity for a scrupulous examination of the record to ascertain whether such a finding is supported by substantial evidence." *State* v. *Frazier*, 185 Conn. 211, 219, 440 A.2d 916 (1981), cert. denied, 458 U.S. 1112, 102 S. Ct. 3496, 73 L. Ed. 2d 1375 (1982); see *State* v. *Harris*, 188 Conn. 574, 580, 452 A.2d 634 (1982), cert. denied, 460 U.S. 1089, 103 S. Ct. 1785, 76 L. Ed. 2d 354 (1983). "The question of voluntariness, as often repeated, turns on the totality of the circumstances. *Boulden* v. *Hollman*, 394 U.S. 478, 480, 89 S. Ct. 1138, 1140, 22 L. Ed. 2d 433 (1969)." *United States* v. *Matthews*, 488 F. Sup. 374, 379 (D. Neb. 1980); see *State* v. *Rosa*, 170 Conn. 417, 424, 365 A.2d 1135, cert. denied, 429 U.S. 845, 97 S. Ct. 126, 50 L. Ed. 2d 116 (1976); *State* v. *Hassett*, 155 Conn. 225, 230, 230 A.2d 553 (1967).

"In order to prove that the defendant has effectively waived his privilege against self-incrimination, the state must prove, by a preponderance of the evidence; *Lego* v. *Twomey,* 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); *State* v. *Wilson,* 183 Conn. 280, 286–87, 439 A.2d 330 (1981); *State* v. *Derrico,* 181 Conn. 151, 162, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980); that the defendant knowingly and intelligently waived his constitutional right to remain silent. *North Carolina* v. *Butler,* 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Waiver is not conclusively established by demonstrating that *Miranda* warnings were given and understood." (Citations omitted.) *State* v. *Harris,* supra, 579–80.

We "must presume that a defendant did not waive his rights; the prosecution's burden is great . . . ." *North Carolina* v. *Butler,* supra. We must look to "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst,* supra; see *State* v. *Williams,* 190 Conn. 104, 112, 459 A.2d 510 (1983). It must also be remembered that the defendant, who had been in custody almost twenty-four hours at the time he was interrogated by Laufer, had already been questioned by Higgins about the same robbery and that the trial court found that he had not waived his rights at that time.

The form which Laufer used to record the defendant's statement contained, on the top on the first page, an advisement of rights section with a statement of waiver. The advisements are not initialed and the "signature" line for the person being questioned is blank. Laufer, nevertheless, signed the form in the space labeled "Witnessed." The separate and unattached waiver form containing the date of "4-2-77," the time

of "642 pm" and the signature of "C. Gray" is clearly relied upon by the state as evidence for its claim of waiver. While there was testimony in the trial court and a conclusion by the court that the date on the signed waiver form was merely a "clerical error," our deference to the trial court's conclusion is limited by evidence which, after a scrupulous examination of the record, leads us to the finding that the defendant did not validly, knowingly and intelligently waive his rights.

The totality of the circumstances demonstrates that the defendant's statement was given at least in part before he waived his rights or signed the waiver form. Higgins, who witnessed the waiver form, was away from Laufer's desk for most of the statement and returned only after the statement was being concluded. She testified that she "thought" she signed the waiver form during the statement but she was "not positive." She did not sign as a witness to the statement, although she signed as witness to the waiver form, because "nobody asked [her] to sign it." The refusal of a defendant to sign the waiver form portion of the statement is not a "controlling" factor, but it is a relevant one. *State* v. *Derrico*, supra, 165; see *United States* v. *Cruz*, 603 F.2d 673, 675 (7th Cir. 1979). The converse of that statement is also true. The defendant's signature on the separate waiver form is a relevant, but not controlling, factor in determining the validity of a waiver. We do not find "affirmative conduct [by the defendant] indicative of a knowingly and intelligently made decision not to remain silent"; *State* v. *Harris*, supra, 581; under all the circumstances of this case. "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda* v. *Arizona*, supra, 475. The circumstances demonstrate less than tolerable treatment of constitutional safeguards, thereby compelling a find-

ing of error on the trial court's admission into evidence of the statement given to Laufer by the defendant on April 3, 1977.

The defendant claims that if we rule that his confession to Laufer is inadmissible, then "it is clear that the remaining evidence would have been insufficient to support a conviction" on any of the seventeen counts in the substitute information. The defendant specifically claims that the state did not "fully comprehend" the nature of its burden of proof under General Statutes § 53a-8,[4] the theory of liability with which the defendant was charged. The defendant concedes that, if the Laufer confession is considered to have been properly admitted into evidence, then there was sufficient evidence to support a conviction on only two counts, conspiracy to commit robbery in the first degree and accessory to robbery in the first degree. The state, at oral argument, conceded that, even if the Laufer statement were properly admitted, there was insufficient evidence to support a conviction on the sixth count, accessory to robbery in the first degree, and on the eleventh count, accessory to kidnapping in the second degree.

We disagree with the defendant's characterizations of the possible alternative dispositions of this case based upon the admissibility of the Laufer confession. We must first address the defendant's claim that the evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt in the four contested counts because "if we were to rule that the evidence was insufficient, the defendant would be entitled to an

[4] General Statutes § 53a-8 provides: "CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

acquittal rather than a new trial. *Burks* v. *United States,* 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)." *State* v. *Ferrell,* 191 Conn. 37, 46, 463 A.2d 573 (1983).

"In determining whether the evidence is sufficient to sustain a verdict, 'the issue is whether the [trier of fact] could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify the verdict of guilty beyond a reasonable doubt.' . . ." (Citations omitted.) *State* v. *Giguere,* 184 Conn. 400, 402–403, 439 A.2d 1040 (1981). " 'In reviewing the evidence we must construe it in a light most favorable to sustaining the verdict. *State* v. *Ferrell,* supra.' *State* v. *Pellegrino,* 194 Conn. 279, 294, 480 A.2d 537 (1984)." *State* v. *Fernandez,* 198 Conn. 1, 22, 501 A.2d 1195 (1985). Under § 53a-8 a person may be prosecuted and punished as if he were a principal offender when, "acting with the mental state required for the commission of an offense, [he] solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense . . . ." The defendant claims that the Laufer statement, exhibit P, is "absolutely devoid of any indication that, at the time the defendant was sitting in his car awaiting the return of his partners from their venture 'to take a bookie off,' it was his conscious objective to assist in any robberies in addition to that of the bookie." He also claims that there was no evidence either to prove that by acting as a lookout he intended to assist his partners in two kidnappings or to indicate that he had the intent to aid his partners in a robbery, including having the intent to commit burglary in order to do so, or even that a burglary had, in fact, occurred.

Exhibit P indicates that the defendant and two companions, Mike and Egghead, discussed "taking the

bookie off" on the afternoon of the subsequent robbery. The defendant drove Mike and Egghead to the Ramada Inn in East Windsor and he remained in the car to act as a lookout. Upon returning to the car, Egghead told the defendant that someone was in the room with the bookie and so they were unable to "get all the money," but he gave the defendant $11. One of Williams' credit cards stolen in the robbery was used to put gas in the defendant's car by a third party to whom Mike had sold the credit card.

Taken together, all the evidence before the trier, including the Laufer statement and the testimony of two victims, as well as the reasonable and logical inferences that may be drawn from that evidence, was sufficient to support a conviction for one count of accessory to kidnapping in the second degree and one count of accessory to burglary in the second degree. It can reasonably be inferred that the defendant, admittedly serving as a lookout during the robbery of a person in a motel, understood and intended that the individual to be robbed would probably have to be restrained by his partners in some manner in order to accomplish the robbery. It is also a reasonable and logical inference that the defendant intended to aid his partners in a burglary because it is also a logical inference that the victim would be in a room, rather than a public area of the motel. The defendant's statement includes a reference to the fact that the robbery was foiled in part because someone was "in the room" with the individual they robbed. The testimony of Williams indicates that, while he and the female victim were in the room, his friend Baker was coming to the room to get him when "somebody got him in the hallway with a gun, and . . . opened the door and came in." Regardless of whether the room was registered to any of the victims inside the room at the time of the robbery, Williams' testimony indicates that the

"intruders," as one victim called them, were not "licensed or privileged" to enter the room and therefore that their entry was unlawful as defined in General Statutes § 53a-102 (a).

We remand this case to the trial court and order that a judgment of acquittal be entered on the sixth and eleventh counts. Because we hold that there was sufficient evidence before the trial court, including the Laufer statement, to sustain the verdicts on the remaining four counts but that the admission of the confession was reversible error, we order that the judgment be reversed and the verdict set aside as to the fourth, tenth, thirteenth and fifteenth counts. The reasoning of the Supreme Court of Missouri in *State* v. *Wood*, 596 S.W.2d 394 (Mo.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980), is relevant here. The *Wood* court said: "When the trial court erroneously admits evidence resulting in reversal, as in the instant case, the State should not be precluded from retrial even though when such evidence is discounted there may be evidentiary insufficiency. The prosecution in proving its case is entitled to rely upon the rulings of the court and proceed accordingly. If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice, if for no other reason, by the time which would be required for preparation and trial of every case. This is consistent with *Burks* v. *United States*, [437 U.S. 1, 15, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)], which lists among examples of trial error

which do not invoke the Double Jeopardy Clause with regard to retrial, the 'incorrect receipt or rejection of evidence.' " *State* v. *Wood*, supra, 398–9. "Double jeopardy does not automatically bar retrial [even] where an insufficiency of evidence results from material being held on appellate review to have been erroneously admitted at trial." *State* v. *Van Isler*, 283 S.E.2d 836, 838–39 (W. Va. 1981); accord, *United States* v. *Tranowski*, 702 F.2d 668 (7th Cir. 1983), cert. denied, U.S. , 104 S. Ct. 3586, 82 L. Ed. 2d 884 (1984); *United States* v. *Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir.), cert. denied, 459 U.S. 834, 103 S. Ct. 77, 74 L. Ed. 2d 75 (1982); *United States* v. *Harmon*, 632 F.2d 812, 813 (9th Cir. 1980); *United States* v. *Mandel*, 591 F.2d 1347, 1373–74 (4th Cir.), aff'd, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961, 100 S. Ct. 1647, 64 L. Ed. 2d 236 (1980); *United States* v. *Block*, 590 F.2d 535, 543 (4th Cir. 1978); *People* v. *Sisneros*, 44 Colo. App. 65, 68, 606 P.2d 1317 (1980); *Mulry* v. *State*, 399 N.E.2d 413, 419 (Ind. App. 1980). Thus, where a reversal of a conviction is not a result of insufficiency of evidence but is predicated on, for example, as here, the reception of inadmissible evidence, e.g., the Laufer statement, a remand for a new trial is proper and an appellate court should not review the remaining evidence to determine whether it is sufficient to sustain the conviction. See, e.g., *United States* v. *Mandel*, supra. The underpinnings for this rule are twofold. From a defendant's point of view, if the evidence were determined to be sufficient, such appellate review would constitute an invasion of the province of the factfinder, the jury. Conversely, if the evidence were determined to be insufficient, unfairness to the state might result because the state might have produced other evidence at the trial if the evidence held inadmissible upon appellate review had been excluded

at the trial. See, e.g., *United States* v. *Mandel*, supra; *People* v. *Sisneros*, supra.

We cannot say unequivocally that with the inadmissible confession thus eliminated from the case there would be proof enough left in the record to sustain a conviction on any one or more of the four remaining counts. "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Burks* v. *United States*, supra, 15. Because we cannot say that the state will be unable to meet its burden of proof without reference to the inadmissible confession, we do not exclude a retrial.[5] See, e.g., *State* v. *Boone*, 284 Md. 1, 17, 393 A.2d 1361 (1978); *State* v. *Van Isler*, supra, 839.

[5] At the trial, while the state's witness Laufer was testifying, the admissibility of the defendant's statement taken by Laufer was being argued. The state at that time said: "I can't proceed if it's [the statement] not in evidence." Whether this meant, and it was not developed, that the state had no case at all against the defendant if the Laufer statement were suppressed or whether it was merely an adversarial declaration by the state, we cannot say with certitude. "It is impossible to know what additional evidence [if any] the [state] might have produced had the faulty evidence been excluded at trial, or what theory the [state] might have pursued had the evidence before the [court] been different. *United States* v. *Mandel*, 591 F.2d 1347, 1373–74 (4th Cir.), [aff'd,] 602 F.2d 653 (4th Cir. 1979) (en banc) [cert. denied, 445 U.S. 961, 100 S. Ct. 1647, 64 L. Ed. 2d 236 (1980)]; *United States* v. *Block*, 590 F.2d 535, 544 n.12 (4th Cir. 1978)." *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980). In any event, we cannot consider it as a confession by the state at the trial that it had no case, in law or fact, against the defendant if the trial court suppressed the Laufer statement.

There is error, the judgment is set aside and the matter is remanded with direction that a judgment of acquittal be entered on the sixth and eleventh counts and for further proceedings in accordance with this opinion on the fourth, tenth, thirteenth and fifteenth counts.

In this opinion DANNEHY, CALLAHAN and SHAUGHNESSY, Js., concurred.

SANTANIELLO, J., concurring in part and dissenting in part. I agree with the court that there was insufficient evidence to sustain the defendant's conviction on the sixth and eleventh counts. I must, however, respectfully disagree with the court's finding that the defendant did not voluntarily, intelligently and knowingly waive his constitutional rights before making his confession to Laufer. The record clearly supports the trial court's finding that the defendant expressly agreed to give the statement and thereby implicitly waived his *Miranda* rights. I therefore would find the confession admissible and would sustain the defendant's conviction on the remaining four counts.

There are ordinarily three means by which a defendant can waive his right to remain silent under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *North Carolina* v. *Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979): he can execute a *written waiver* of his rights, he can make an express *oral statment of waiver*, and he can *implicitly waive* his right to remain silent by exhibiting affirmative conduct indicative of a knowingly and intelligently made decision to give a statement. *North Carolina* v. *Butler*, supra, 374. We have held many times that where a defendant expressly agrees to give a statement, such conduct may constitute an implicit waiver of his *Miranda* rights. *State* v. *Shifflett*, 199 Conn. 718,

733, A.2d (1986); *State* v. *Toste,* 198 Conn. 573, 583, 504 A.2d 1036 (1986); *State* v. *Harris,* 188 Conn. 574, 580, 452 A.2d 634 (1982), cert. denied, 460 U.S. 1089, 103 S. Ct. 1785, 76 L. Ed. 2d 354 (1983).

The majority found that "there was sufficient evidence before the trial court to sustain its conclusion that the defendant was advised of and understood his constitutional rights" but went on to hold that there was insufficient evidence to support the court's finding that he waived his rights. The majority focused its waiver analysis on the validity of the written waiver and concluded that because the written waiver was not executed until half-way through the confession, there was, under the totality of the circumstances, insufficient evidence of waiver. The court did not fully address the question of an implied waiver, and it summarily concluded that there was no affirmative conduct evidencing a "knowingly and intelligently made decision not to remain silent." In analyzing the issue, the majority has failed to explain that the trial court based its finding of waiver on the defendant's affirmative conduct expressly agreeing to speak with Laufer, and not on the written waiver.[1] The majority thus has misperceived the issue and has overlooked the evidence on the record which supports the trial court's conclusion.

[1] It was argued to the trial court that the defendant had orally waived his right to remain silent and that his expressed willingness to speak constituted an implied waiver. The trial court admitted the confession on these grounds stating: "The Court concedes that the time varied, in that Mr. Gray had set the time between 5:00 and 6:00 a.m. on April 3rd, but he did agree to another fact as to evidence which the Court had before it, the testimony of Chief Laufer, and also of Officer Higgins, that *he did waive his rights, he waived them and agreed to talk with Chief Laufer on a limited subject; namely, the credit card situation.* Officer Higgins testified to this fact, as did Chief Laufer and Mr. Gray." (Emphasis added.) The court further stated: "The defects in the form of the waiver; namely, the date and time, are satisfactorily explained by examining the totality of the testimony. Further, the Court is of the opinion that the resolution of this matter does not stand or fall on this issue. *The Court has been unable to find any law to support*

Regardless of the validity of the written waiver, the record reveals that the defendant implicitly waived his right to remain silent by his expressed willingness to speak. The defendant himself took the stand at the suppression hearing and stated: "[A]nd [Laufer] said before he asked me any questions concerning these credit cards, I had to sign a waiver, you know, to be able to talk to him. *And I told him I didn't mind talking* about any credit cards, because I didn't know. He asked me, he want[ed] to know who used the card. And at that time, I signed the waiver of my rights, while I [was] there, talking to him . . . ." (Emphasis added.) Later he also stated: "[Laufer] told me that I didn't have to talk to him, and he showed me a piece of paper. He said it was an affidavit. He said, 'Before I can talk to you, you have to sign this, for the limited purpose of me asking you about, you know, the credit cards.' He said he wanted it to be legit, and then, *that's when I volunteered,* and signed the paper." (Emphasis added.) When Laufer testified, it became clear that the defendant had signed the written waiver half-way through the confession, but it was emphasized that the defendant had expressly agreed to give the statement and waive his rights. Laufer, when questioned about why the waiver was signed in the middle of the confession, explained: "I felt at that time I wanted the time he signed it, acknowledging this, as well, in front of somebody else. *He had already acknowledged it to me.*" (Emphasis added.)

Thus, although I agree with the majority that the procedures employed in obtaining the second confes-

a conclusion that Miranda warnings of rights and waiver has to be in writing. The State has the burden, and a heavy one, I might note, of establishing the accused person was given his rights; that he knowingly and voluntarily waived these rights. The State rightfully has a heavy burden, and the Court concludes that the State has sustained this burden, as it applies to the admissions made in an unsigned statement by Charles Gray while in custody." (Emphasis added.)

sion were less than exemplary, I am constrained to hold that there was more than sufficient evidence to find that the defendant waived his right to remain silent. The record clearly shows that the defendant expressly desired to give a statement, and that he implicitly waived his *Miranda* rights. My conclusion is buttressed by the fact that this issue was not seriously pressed on appeal. The defendant, obviously acknowledging his own testimony at the suppression hearing, did not dispute that the evidence on the record supported a finding of implicit waiver, but instead argued that cases such as *State* v. *Harris*, supra, could be distinguished on the ground that in those cases a "more complete" *Miranda* warning was given.

The defendant was fully apprised of, understood and freely waived his right to remain silent. I therefore concur with the court that a judgment of acquittal should be entered on the sixth and eleventh counts, but dissent from the court's judgment reversing the defendant's conviction on the fourth, tenth, thirteenth and fifteenth counts.

BEST AVAIL

RULING OF THE STATE TRIAL COURT CONCERNING THE RESPONDENT'S CONFESSION

(from the Transcript of Proceedings in Hartford Superior Court on July 8, 1982, at pages 2-6)

* * *

THE COURT: After adjournment last evening, I had an opportunity to review my notes. And in reviewing my notes, I had in mind the several objections that were raised and addressed to the admission of the document. And in reviewing my notes, I concluded from the facts, and based on the testimony of Chief Laufer, the testimony of Charles Gray, and the testimony of Office Higgins that a reasonable conclusion would be that the document was signed, or witnessed—the waiver was witnessed, was signed and witnessed on April 3, 1977, rather than April 2nd. Certain facts are convincing to this Court in that connection; the testimony of Officer Higgins in relation to the time of arrest of Charles Gray at Halsey Street on April 2nd, which was approximately 7:00 p.m., thereby precluding any possibility that the statement could have been taken at police headquarters in Springfield at or prior to 6:42 on April 2nd. That would lead to the inescapable conclusion that the statement had to be—or the waiver had to be on April 3rd.

This is further corroborated as to the date, but not as to the time, by Charles Gray, the defendant, on the witness stand. He testified that Chief Laufer gave him his rights on April 3rd, on Sunday morning.

Now, granted that their time sequence varied—is this Chief Laufer in the courtroom?

MR. APPLETON: Yes, your Honor.

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THE COURT: I think he shouldn't be in here.

The Court concedes that the time varied, in that Mr. Gray had set the time between 5:00 and 6:00 a.m. on April 3rd, but he did agree to another fact as to evidence which the Court had before it, the testimony of Chief Laufer, and also of Officer Higgins, that he did waive his rights, he waived them and agreed to talk with Chief Laufer on a limited subject; namely, the credit card situation. Officer Higgins testified to this fact, as did Chief Laufer and Mr. Gray.

The Court is further impressed by Mr. Gray's testimony concerning the abuse which he was subjected to between the time of his arrest and the early morning hours of April 3rd, and the Court finds it difficult to accept the exaggerated—what appears to be an exaggeration of whatever conduct occurred, if any did occur. The Court finds it not credible that one in the condition that Mr. Gray was in, if his story is to be believed, that he could so accurately recall his waiver on the morning of taking his testimony of April 3rd, and what transpired thereafter, knowing well each of the minute details that transpired; having the presence of mind to limit his statement to the matter that Chief Laufer was concerned with alone. He put it in a time frame which the Court does not accept, but he places it there, and at a time when, if his testimony were believed, he was agonizing. The Court finds that this testimony is not credible, but the Court hastens to comment that it concludes that it is not credible based upon testimony of Chief Laufer, and, perhaps, to a very limited extent, on the testimony of Officer Higgins.

The Court cannot condone the conduct of the Springfield Police in the subterfuge practiced upon this or any other accused person, and the Court cannot help but look with a jaundiced eye upon the testimony that it was hearing here in the court as to other matters.

However, the Court rejects as not credible the testimony of Mr. Gray concerning his treatment which he received at the hands of the police on the night of April 2nd and the morning of April 3rd.

The defects in the form of the waiver; namely, the date and time, are satisfactorily explained by examining the totality of the testimony. Further, the Court is of the opinion that the resolution of this matter does not stand or fall on this issue. The Court has been unable to find any law to support a conclusion that Miranda warnings of rights and waiver has to be in writing. The State has the burden, and a heavy one, I might note, of establishing the accused person was given his rights; that he knowingly and voluntarily waived these rights. The State rightfully has a heavy burden, and the Court concludes that the State has sustained this burden, as it applies to the admissions made in an unsigned statement by Charles Gray while in custody. Accordingly, the defendant's objection is overruled. Exception may be noted. May be marked a full exhibit.

* * *

EDITOR'S NOTE

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NO. 86-448

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,

Petitioner

v.

CHARLES M. GRAY,

Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Charles M. Gray, asks leave to proceed in forma pauperis pursuant to Rule 46.

Respondent's affidavit in support of this motion is attached hereto. Respondent was permitted to proceed in forma pauperis in the Supreme Court of Connecticut by an order of the Superior Court of Connecticut dated October 29, 1982.

RESPONDENT
CHARLES M. GRAY

BY G. Douglas Nash

G. DOUGLAS NASH
Chief Public Defender Office
121 Elm Street
New Haven, CT 06510
Counsel for Respondent

October 10, 1986

NO. 86-448

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,

Petitioner,

v.

CHARLES M. GRAY,

Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

AFFIDAVIT IN SUPPORT OF MOTION FOR

LEAVE TO PROCEED IN FORMA PAUPERIS

I, Charles M. Gray, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in this case without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? No. I was last employed in April, 1986, when I received approximately $80.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes. The total income I received from working in full-time or part-time jobs during the last twelve months is approximately $2000.00.

3. Do you own any cash or checking or savings account? Yes. I have approximately fifty dollars in cash.

4. Do you own any real estate stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes. I own a 1978 Cadillac worth approximately $1000.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. My mother, Cleo Gray, and my six-year-old son, Tyson Gray.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

CHARLES M. GRAY

SUBSCRIBED AND SWORN to before me this 8th day of October, 1986.

SONIA P. FRANCIS
Notary Public, State of New York
Qualified in Bronx County
No. 4823351
Commission Expires March 30, 1988

NO. 86-448

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT,

Petitioner

v.

CHARLES M. GRAY,

Respondent

OCTOBER TERM, 1986

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WILL A WRITTEN WAIVER OF A SUSPECT'S FIFTH AMENDMENT RIGHTS EXECUTED AT OR NEAR THE END OF HIS INTERROGATION BY POLICE NECESSARILY RENDER HIS STATEMENT TO POLICE ADMISSIBLE WHERE OTHER CIRCUMSTANCES DO NOT SUPPORT A FINDING OF A VALID WAIVER?

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OPINIONS BEL

In addition to the opinion Connecticut Supreme Court, reported at 200 Conn. 523, A (1986), and the oral ruling of the state trial judge ed in the Petitioner's Appendix, pp. 23A-25A, the unrepo itten memorandum of the trial court's decision to suppre arlier alleged statement by the respondent is also releva his case and has been reprinted in the Respondent's Ap p. 1A.

JURISDICTION

The jurisdiction of this Court, set forth in the petition, is conceded by the respondent.

STATEMENT OF THE CASE

A. Introduction

In this case the Connecticut Supreme Court held that a written waiver of a suspect's fifth amendment rights executed at, or near, the end of his interrogation did not satisfy the state's burden of proving by a preponderance of the evidence a knowing and intelligent waiver of his right to remain silent in the face of other circumstances surrounding the interrogation which supported a finding of no valid waiver. A thorough review of the evidence before the Connecticut Supreme Court clearly demonstrates that its decision was consistent with the principles set forth by this Court in North Carolina v. Butler, 441 U.S. 369 (1979).

B. The Evidence Presented At the Suppression Hearing

Although only the respondent's alleged statement to Lieutenant Laufer was the confession at issue in this case, placing in proper context the evidence directly pertaining to it requires reference to the circumstances surrounding the respondent's alleged earlier statement to Officer Higgins.

On April 3, 1977 at 7:30 a.m., Officer Paula Higgins interrogated the respondent at the crime prevention bureau of the Springfield police department. (Pet. App. at 4A-5A).[1] At the suppression hearing Higgins testified that she had advised

---

1. As used herein, "(Pet. App.)" will refer to the petitioner's appendix, "(Pet.)" will refer to the petition and "(Resp. App.)" will refer to the respondent's appendix.

the respondent of his rights and that the respondent had informed her that he was "familiar with his rights" and that he "wanted to talk, anyway." (Pet. App. at 5A). This interrogation lasted approximately forty-five minutes. (Pet. App. at 5A). Higgins' fellow officer, Seymour, subsequently forged the respondent's signature on a copy of this statement. (Pet. App. at 6A).

The trial court granted the respondent's motion to suppress the statement to Higgins. (Pet. App. at 4A). The trial court's ruling was issued in a written memorandum of decision. (Resp. App. at 1A). In its memorandum the trial court concluded that tne defendant had been advised of his "Miranda rights." (Resp. App. at 1A). The trial court further concluded, however, that the evidence did not satisfy it that the respondent had voluntarily and knowingly waived his rights. (Resp. App. at 1A). The petitioner has never challenged this ruling. (Pet. at 2).

Approximately eleven hours after Higgins' interrogation, while he was still in custody at the Springfield police station, the respondent was interrogated by Lieutenant Laufer of the East Windsor, Connecticut police department. (Pet. App. at 6A). At that time Laufer was aware that Higgins had already obtained a statement from the respondent and he was aware that the substance of that statement concerned the crime he was investigating. (Pet. App. at 6A). The form on which the respondent's alleged statement to Laufer was written includes, on the top of the first page, an advisement of rights section with a statement of waiver. (Pet. App. at 11A; Resp. App. at 2A). When Laufer had taken statements from the victims in this case on similar forms, those witnesses had been asked to initial these advisements. (7/7/82 T. at 185-86). On Exhibit P, however, these advisements were

inexplicably left blank. (Resp. App. at 2A). Under the waiver section in Exhibit P Laufer signed his name as a purported witness to the nonexistent signature of the respondent which would have appropriately been placed on the line designated for such a signature. (Resp. App. at 2A). On each of the three pages of Exhibit P Laufer signed his name adjacent to the phrase, "Subscribed and sworn to before me" and marked an "X" in apparent reference to where he wanted the respondent's signature to be placed. (Resp. App. at 2A-4A). The respondent's signature appears nowhere on Exhibit P. (Resp. App. at 2A-4A).

The separate and unattached waiver form, Exhibit O, "clearly relied upon by the [petitioner] as evidence for its claim of waiver"; (Pet. App. at 12A); is dated "4-2-77" and was signed at 6:42 p.m." (Pet. App. at 11A-12A). Although the trial court concluded that the error in the date was a mere "clerical error"; (Pet. App. at 12A); it is clear that the form was signed by the respondent twelve minutes into the interrogation. (Pet. App. at 7A). Laufer testified that the written waiver was executed at 6:42 p.m. because Higgins had previously left the area and was not available to witness the waiver. (Pet. App. at 7A). When Higgins returned, and witnessed the waiver, "the statement was being concluded." (Pet. App. at 12A).

C. The Decision Of The Supreme Court Of Connecticut

In several material respects the petitioner has distorted the factual basis for the opinion of the Connecticut Supreme Court. Although it is true that the opinion contained a summation of the testimony of Officer Higgins; (Pet. App. at 4A-5A); contrary to the petitioner's representation; (see Pet. at 2); neither

the majority opinion nor the dissenting opinion below relied on Higgins' testimony that, after the defendant had informed her that he was "familiar with his rights," he indicated that he "wanted to talk, anyway." (Pet. at 2; Pet. App. at 19A-22A). In fact, in view of a) the trial court's finding that the respondent had been read his rights prior to giving a written statement to Higgins and b) its conclusion that the state had not demonstrated a sufficient waiver prior to such statement (Pet. at 2; Pet. App. at 6A; Resp. App. at 1A), the trial court had implicitly but necessarily found that Higgins' testimony that the respondent had said he "wanted to talk, anyway," was not credible. The petitioner's attempt to incorporate this evidence into the holding of the Connecticut Supreme Court's decision is, simply, misleading. (See Pet. at 1-2). The petitioner has also incorporated into its version of the holding below; (Pet. at 1, 3); the petitioner's testimony that he "didn't mind talking about any credit cards." (See Pet. App. at 21A). As used by the petitioner, this testimony has been taken out of context. The respondent had expressed a willingness to discuss the limited subject of his knowledge of the use of stolen credit cards to purchase gasoline for his car and, according to his testimony, signed the waiver form for that limited purpose. (Resp. App. at 5A-7A). At no time did the respondent testify that he had professed a willingness to discuss the Ramada Inn robbery.

The petitioner has also noted that Laufer testified that the respondent had "acknowledged his rights and waivers prior to the signature" on the waiver form. (Pet. at 3 n.3). At the suppression hearing the petitioner did not attempt to have Laufer explain what he meant by this testimony. Furthermore, he never specified, in relation to the statement, when this "acknowledgment" took place.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS IN ACCORD WITH NORTH CAROLINA v. BUTLER

Because of the petitioner's reliance on a distorted view of the evidence upon which the Connecticut Supreme Court based its decision in this case, the petitioner's arguments in support of granting the writ are, understandably, misguided.

One faulty premise for the petitioner's arguments is that in the absence of the evidence of the belatedly signed written waiver, the petitioner had met its burden of proving a valid implicit waiver. Such was hardly the case. When viewed in light of the following facts and reasonable inferences supported by the evidence produced at the suppression hearing, the petitioner's assertion that "[l]ittle dispute can exist" that there had been a valid implicit waiver; (Pet. at 5); is, to say the least, unreasonable:

1. The respondent refused to sign his statement to Laufer (Resp. App. at 2A-4A; Pet. App. at 7A);
2. Although Laufer had had the victims initial the advisements on the first page of each of their statements (7/7/82 T. at 185-86); he had been unsuccessful in getting the respondent to do the same on his statement (Resp. App. at 2A; Pet. App. at 11A);
3. Laufer's signature as a witness to the written waiver on the first page of the statement (Resp. App. 2A) reflected his unsuccessful attempt to have the respondent execute a written waiver in regard to the discussion of the subject matter of the statement;

4. Laufer's interrogation concerned the same subject matter on which the respondent, only eleven hours earlier, had not waived his right to remain silent. (Resp.App. 1A; Pet. App. at 11A); and

5. The respondent had remained in custody between the time of his arrest and the time of his statement to Laufer. (Pet. App. at 11A).

In regard to the written waiver the petitioner failed to produce evidence as to why, if in fact the respondent had wished to waive his rights in regard to the contents of the statement to Laufer, he did not sign the waiver on the statement itself (Resp. App. at 2A) but instead signed a waiver in a separate and unattached document. (Pet. App. at 11A). The petitioner's speculation that "the delay in signing the waiver form occur[red] as a result of a valid police concern for the presence of an additional witness to the signature"; (Pet. at 6); fails to explain why the waiver form was not executed at the start of Laufer's interrogation when Higgins, ultimately the "additional witness to the signature," was present.[2] In short, no reasonable explanation was ever offered by the state's witness as to why the written waiver was not executed at the start of the interrogation.

---

2. At the suppression hearing Higgins had testified:

> I was there when he started talking to Mr. Gray, when he advised him of his rights. I recall seeing him start to explain it, draw the map. I was called away. And I know that I came back after he was writing, and I can remember him writing the end of the statement, "Do you realize, or I know that there's a penalty for giving a false statement to a police officer," I was there for that part.

(7/7/82 T. at 127).

It is against this backdrop of unexplained suspicious circumstances that the petitioner argues that a valid waiver is apparent.

The issue in this case is not, as the petitioner frames it, "whether the late signing of a waiver form can destroy an otherwise valid waiver"; (Pet. at 5); but, whether a written waiver executed belatedly under suspicious circumstances will inevitably compel a finding of a valid waiver where other circumstances suggest no such waiver. As the petitioner has acknowledged, in North Carolina v. Butler, 441 U.S. 369, 373 (1979), this Court noted that "[a]n express waiver or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably ... sufficient to establish waiver. (Pet. at 5). (Emphasis added). Obviously, no more can be expected from the peculiar written waiver in this case.

A review of the decision below clearly reveals its consistency with this Court's opinion in Butler. Unlike the opinion of the North Carolina Supreme Court before this Court in Butler, the decision below did not apply an inflexible rule requiring a valid waiver to be explicit. Citing Butler, the Connecticut Supreme Court recognized that the issue was whether "the defendant knowingly and intelligently waived his constitutional right to remain silent.'" (Pet. app. at 11A). As this Court had done in Butler, supra at 374-75, the decision below noted that, in regard to the issue of waiver, a reviewing court "must look to 'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'"(Pet. App. at 11A, citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Indeed, the Connecticut Supreme Court noted: "The defendant's signature on the separate waiver form is a relevant, but not controlling, factor

in determining the validity of a waiver." (Pet. App. at 12A); see North Carolina v. Butler, supra at 373. Furthermore, far from requiring evidence of an explicit waiver, the Connecticut Supreme Court identified the object of its search in the record as "'affirmative conduct [by the defendant] indicative of a knowingly and intelligently made decision not to remain silent.'" (Pet. App. at 12A). (Emphasis added).

The petitioner has extracted from the opinion below the court's reference to its finding of "less than tolerable treatment of constitutional safeguards" (Pet. App. at 12A; Pet. at 6) and unjustifiably assumes that the court was referring to the Springfield officer's supposed "subterfuge" in forging the respondent's signature on the suppressed statement. It is clear from the opinion, however, that the court was not referring to that conduct but rather to the circumstances surrounding the waiver executed at or near the conclusion of the statement to Laufer. (See Pet. App. at 12A-13A). The petitioner's assertion that "a finding of involuntary Miranda waiver [for the suppressed statement] does not in any way impair the admissibility of the respondent's second confession"; (Pet. at 6); is an overbroad characterization of this Court's holding in Oregon v. Elstad, 105 S.Ct. 1285 (1985). In Elstad this Court found that a confession obtained after a valid waiver did not have to be suppressed under the theory that it had been inevitably tainted by an earlier voluntary but unwarned admission. In the decision below in the instant case the court stated: "It must also be remembered that the defendant ... had already been questioned by Higgins about the same robbery and that the trial court found that he had not waived his rights at that time." (Pet. App. at 11A). This Court's decision in

Elstad certainly did not preclude the court below from considering, as one relevant factor pertaining to waiver, the absence of waiver by the petitioner only hours earlier during an interrogation on the same topic. The court below did not utilize the "taint" theory which the Oregon Court of Appeals had employed in Elstad. See 105 S.Ct. at 1289. The petitioner also asserts that "the fact that Lieutenant Laufer purported to witness the respondent's signature to the second confession when the respondent had not in fact signed also has no bearing on the validity of the second confession." (Pet. at 6). Obviously, a suspect's refusal to put his signature anywhere on a statement which includes, on the first page, a waiver of rights section, is relevant to the issue of whether he wished to waive his rights. (See Resp. App. at 2A).

In concluding that the petitioner had failed to prove, by a preponderance of the evidence, that the respondent had knowingly and intelligently waived his constitutional right to remain silent, the Connecticut Supreme Court properly applied the principles established by this Court pertaining to the issue of a valid waiver of a suspects's fifth amendment rights.

CONCLUSION

The writ should be denied.

CHARLES M. GRAY
RESPONDENT

BY _____

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With Whom, On The Brief Was:

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No. 86-448

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner

v.

CHARLES M. GRAY,
Respondent

RESPONDENT'S APPENDIX

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TRIAL COURT'S MEMORANDUM OF DECISION
ON MOTION TO SUPPRESS
(RE: STATEMENT TO HIGGINS)

NO. 48449	SUPERIOR COURT
STATE OF CONNECTICUT	JUDICIAL DISTRICT HARTFORD-NEW BRITAIN
VS.	at HARTFORD
CHARLES M. GRAY	JULY 22, 1982

MEMORANDUM OF DECISION
MOTION TO SUPPRESS

The defendant objected to the admission of an alleged statement offered by the state, Exh L, for identification. An evidentiary hearing was held and as a result the court concluded that the statement was taken while the accused was in lawful custody having been arrested by a warrant supported by probable cause. While in custody he was read his Miranda rights before the statement was typed, however, some question arises as to whether he voluntarily and knowingly waived his rights.

The defendant's testimony did not impress the court as entirely credibile, but rather was largely tainted by gross exaggeration as to physical abuse and deprivation. The court did conclude, however, that the accused's position that he did not waive his rights is bolstered by testimony of Officer Higgins, that he did not consent or agree to talk about their (the Springfield) case. The evidence left sufficient questions unanswered so as to compel the court to include that the state has failed to sustain its burden of proof by a fair preponderance of the evidence and accordingly the motion to suppress must be sustained.

/s/ ODonnell, J., ,J.
O'Donnell, J.

TRIAL EXHIBIT P (STATEMENT TO LAUFER)

Subscribed & sworn to before me on 4-3-77 Springfield man (P.D) S. Laufer

Case No. 77-03411 EAST WINDSOR POLICE DEPARTMENT Page 1 of 1 Pages
waiver

STATE OF CONNECTICUT
ss East Windsor
COUNTY OF HARTFORD

Date 4-3-77
Time Started 6:30 Pm
Time Completed 6:50 Pm

I, [illegible] of [illegible] (Address)

Age [illegible] DOB [illegible] (Month, day, year) No Phone (Phone Number)

I have been advised that:

(1) I have the right to remain silent. _____
(2) If I talk to any Police Officer, anything I say can and will be used against me in court. _____
(3) I have the right to consult a lawyer before I answer any questions and I may have a lawyer with me during questioning. _____
(4) I have the right to have a lawyer appointed for me, if I cannot afford one, before I answer any questions. _____
(5) I know that if I answer questions, I have the right to stop answering at any time. _____
(6) I may stop answering questions at any time if I wish to talk to a lawyer, and I may have him with me during any further questioning. _____

I am willing to answer questions and make a statement knowing that I have these rights. I do not want a lawyer; I know and understand what I am doing. I do this freely and voluntarily, and no threats or promises have been made to me.

Witnessed: [illegible] Signature: _____

STATEMENT

[illegible] Wednesday night I went to [illegible] Tavern with [illegible] and Laufer. [illegible] When [illegible] Tavern I walked around by myself [illegible] I went to make a phone call or about the same time I think on a Friday night, I drove down to Windsor Locks in my car, a 1974 Mercury Cougar with license registration 745 965. In the car was a Mike [illegible] or something like that [illegible] was called "Eyeball" I think Eyeball lives [illegible]

X

Continued statement of Charles Gregg Page 2 of 2

[illegible] Place on Springfield Street, Mass. It is about 1:2 about
2 [illegible] and between Springfield & Chicopee [illegible]
off [illegible] Mass. [illegible] Charles [illegible]
[illegible] Mass. [illegible] We drove to the Ramada
Inn off of [illegible], parked the car on the side. We
[illegible] with [illegible] and [illegible] off [illegible]
[illegible] Mass. [illegible] came out. Englund
[illegible] full [illegible] same one that was out
of [illegible] Mass. [illegible] at [illegible] Mike Lund
[illegible] I [illegible] and Charlie was [illegible]
[illegible] the next was [illegible]. We talked about taking the
[illegible] off the alternator of 1-29-77 or there about. While
[illegible] we [illegible] in the building at Ramada Inn or about
Jan 29, 1977, I stayed in the car to be a look out.
I waited about 40 mins, they came back with a
bag. Englund said we didn't get a change to get all
the money, someone was in the room with Gina. When
they came out of the Inn, Englund pulled his hat
band, part of an overall jacket - he had the mask on
top of his head & took it off, Crump had a bag,
I'm sure what was in it. They gave me $11.00 of
what they got. We left & came back to Springfield,
Mass. Crump sold some credit cards to Charles
Cotton. One of the cards Crump sold to Cotton,
Cotton had used to put gas in my car a couple of

Subscribed and sworn to before me at Springfield Mass this 3 day of April
1977

[illegible]

- 3A -

Continued statement of Charles Coney Page 3 of 3

Jump after the Ramada Inn Robbery, this would have been some time around Jan 21, 1977 at a BP gas station on St Jo. in Ave Springfield. This was a credit card in the name of Roger Williams.

The above statement is true & correct. I understand that the gave a false statement to a police officer in order to mislead him in his investigation a crime & I could be arrested for same. I have read this statement & will appear in court as a witness if called.

X

Note: Suspect would not sign statement, he did swear under oath to this officer that it was true.

Subscribed and sworn to before me at Springfield, Mass this 3 day of April 1977

X

EXCERPTS FROM THE RESPONDENT'S
SUPPRESSION HEARING TESTIMONY
(TRANSCRIPT DATED JULY 7, 1982)

* * *

Q Did you see [Laufer] again on the 2nd, which would be Sunday?

A Right, that's on Sunday evening.

Q What time?

A Oh, it had to be around 7:00, just for a few minutes. He, like, walked in, and then he immediately walked out. And then I saw him again the following morning, and he said before he asked me questions concerning these credit cards, I had to sign a waiver, you know, to be able to talk to him. And I told him I didn't mind talking about any credit cards, because I didn't know. He asked me, he want to know who used the card. And at that time, I signed the waiver of my rights, while I being there, talking to him, specifically about credit cards. He did not ask me anything--

Q This was Laufer?

A He did not ask me anything was I involved in any other kind of crimes, besides the credit cards.

Q I see. Who was present when you signed this waiver, or this paper, or--

A I think--

Q --Laufer?

[p. 28]

A --Detective Higgins.

Q Now, that would be Sunday morning, to the best of your recollection?

A Patrolman Higgins.

Q That was a Sunday morning?

A Yes, sir.

* * *

[p. 29]

* * *

Q When you first saw [Laufer], did you sign something for him?

A I remember signing a paper from him that morning, before day.

Q The next day, in the morning?

A Yes, sir.

Q The 3rd?

A Yes, sir.

Q Sometime, though, you recall, in the morning?

A The morning before day, yes, sir. He said he wanted to question me about credit cards.

Q Did he advise you of your rights?

A He told me that I didn't have to talk to him, and he showed me a piece of paper. He said it was an affidavit. He said, "Before I can talk to you, you have to sign this, for only the limited purpose of me asking you about, you know, the credit cards." He said he wanted it to be legit, and then, that's when I volunteered, and signed the paper.

Q You did. Did you give him a statement, also?

A No, sir, I didn't give him, a statement.

Q Never told him anything?

A No, sir. The only thing I told him is that I didn't have anything to do with the credit cards, and I didn't know stolen credit cards had been used to purchase gas for my automobile.

Q Before you said anything to him, you signed that paper. Is that right?

A Beg your pardon?

Q Before you said anything to him, you signed the paper for Lieutenant Laufer; is that right?

A Yes, sir.

* * *

[p. 51]

(3)

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

86 No. 448

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

CHARLES M. GRAY,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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ARGUMENT

The State of Connecticut replies to three points made by the respondent, two of which involve what the respondent labels as a "distorted" view of the factual basis for the Connecticut Supreme Court's opinion. Respondent's Brief (Resp. Br.) at 3, 5.

1. The respondent first claims that the State has distorted the factual basis of the Connecticut Supreme Court's opinion by citing the Court's finding that the respondent had told Officer Higgins, prior to the respondent's first confession, that he was "familiar with his rights" but that he "wanted to talk anyway." Pet. at 2; Resp. Br. at 4. It is hard to see how the State, by relying on this fact, has distorted the Court's factual basis when the Court itself has included this fact in identical form in its factual summary. Pet. App. at 5A. Although the Court understandably did not rely on this fact in its analysis, since it tends to undermine its conclusion, nothing precludes the State from relying on it in this Court. The respondent himself argues that the facts and circumstances surrounding the first confession bear significance on the admissibility of the second. Resp. Br. at 9. Logically, this rule applies for the State's benefit as well. Thus the Connecticut Supreme Court's recitation of testimony revealing that the respondent understood his rights and wished to waive them prior to his first confession appropriately supports a similar conclusion with regard to his second confession.

2. The respondent also charges the State with distorting and taking out of context the respondent's statement that he "didn't mind talking about any credit cards." Pet. at 3; Resp. Br. at 4. Dissenting Justice Santaniello specifically relied on this statement to support his conclusion that the respondent "implicitly waived his right to remain silent by his expressed willingness to speak." Pet. App. at 21A. This analysis was proper. The respondent had testified that Lieutenant Laufer did not ask him anything concerning whether he was "involved in any other crimes, besides the credit cards." Resp.

App. at 5A. Since the respondent provided a lengthy confession that detailed his involvement not only with stolen credit cards but also in the underlying robbery, Pet. App. at 7A n.3, it appears, given the respondent's testimony, either that the respondent volunteered the additional information concerning his involvement in the robbery, which would certainly eliminate all constitutional concerns, *see Miranda v. Arizona*, 384 U.S. 436, 478 (1966), or, more likely perhaps, the respondent considered the phrase "credit cards" to refer to the entire motel robbery as opposed to any other crimes in which he may have participated. In either event, Justice Santaniello's conclusion that the respondent had implicitly waived his rights as to the entire robbery remains valid.

3. Finally, the respondent labels the delay in the signing of the rights waiver form as "suspicious" because, according to the respondent, Officer Higgins was present and available at the outset of the confession to serve as a witness to the respondent's signature. Resp. Br. at 6–7. The Connecticut Supreme Court, however, made no mention of this possibility, and instead made the essentially opposite observation that "neither the witness nor the defendant signed the form until 6:42 p.m. because '[t]he officer that was nearby had left.' " Pet. App. at 7A. Certainly nothing in the opinion below provides any indication that the delay in the respondent's signing of the rights waiver form stemmed from any reluctance on his part to speak with the police. Under these circumstances, the fact that the respondent eventually signed the rights waiver form can only add to and not subtract from the abundant evidence that he waived his *Miranda* rights.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, this Court should grant a writ of certiorari to the Connecticut Supreme Court and summarily reverse its judgment.

Respectfully submitted.

THE STATE OF CONNECTICUT

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